

1983

## **Lenore M. Gill v. Ruland J. Gill : Brief of Defendant-Respondent**

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LENORE M. GILL, )

Plaintiff-Appellant, )

vs. )

Case No. 19142

RULAND J. GILL, )

Defendant-Respondent. )

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BRIEF OF DEFENDANT-RESPONDENT

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Appeal from Judgment of the  
Third Judicial District Court for Salt Lake County  
Honorable J. Dennis Frederick

---

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## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE KIND OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	1
STATEMENT OF FACTS .....	1
ARGUMENT .....	4
POINT I	
THE DISTRIBUTION ORDERED BY THE COURT IS A PROPER EXERCISE OF JUDICIAL DISCRETION .....	4
POINT II	
THE COURT DID NOT FIND THAT DEFENDANT VIOLATED THE RESTRAINING ORDER. ....	4, 6
POINT III	
AWARD OF ATTORNEYS FEES WERE PROPER EXERCISE OF JUDICIAL DISCRETION.....	4, 8
CONCLUSION .....	10

### CASES CITED

<u>Beckstrom v. Beckstrom</u> , Utah, 578 P.2d 520 (1978) .....	10
<u>Gibbon v. Gibbon</u> , 656 P.2d 407 .....	5
<u>Savage v. Savage</u> , 658 P.2d 1201 (Utah 1983) .....	9
<u>Sears v. Riemersma</u> , 655 P.2d 1105 .....	9
<u>Turner v. Turner</u> , Utah 649 P.2d 6 (1982) .....	6
<u>Turtle Management v. Haggis Management</u> Utah, 645 P.2d 667 (1982) .....	9
<u>Woodard v. Woodard</u> , 656 P.2d 431 .....	6

IN THE SUPREME COURT  
OF THE STATE OF UTAH

LENORE M. GILL,

Plaintiff-Appellant,

vs.

RULAND J. GILL,

Defendant-Respondent.

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Case No. 19142

STATEMENT OF THE KIND OF CASE

This is an appeal by Plaintiff from a Decree of Divorce which distributed property and assets in a manner contrary to Plaintiff's wishes.

DISPOSITION IN LOWER COURT

This matter was tried to the Court, Findings of Fact, Conclusions of Law and Decree were perfected and filed and disposed of the marital assets acquired by the parties during marriage.

RELIEF SOUGHT ON APPEAL

Defendant seeks a modification of the property distribution as ordered by the trial court.

STATEMENT OF FACTS

Plaintiff filed an action for divorce and prayed for equitable property distribution of marital assets acquired during

the marriage between herself and defendant. A stipulated Restraining Order was entered on the records of the court on the 29th of October, 1979, which contained a clause restraining Defendant from encumbering or disposing of, in any manner whatsoever, any assets or properties of the Utah corporations Gill Tire Market, Inc. or Fleetway, Inc. without the express prior knowledge and approval of Plaintiff or without obtaining appropriate court order (R. 21).

At the time of the order, the Defendant was operating Gill's Tire Market and Fleetway, Inc. and made his living as the operator of those corporations. Plaintiff did not participate in the management of either corporation, and after the Restraining Order was entered, Defendant continued to operate the businesses and used the assets of Fleetway, Inc. when it became defunct to operate a retail tire outlet in the name of Tire City. None of the businesses succeeded and, as a consequence, the marital estate being used by Defendant decreased in value.

At the Plaintiff's request, the divorce action was bifurcated and a decree obtained by Plaintiff on the 22nd day of January, 1980 which reserved the issues regarding distribution of parties' marital assets for further proceeding (R. 41). At the time of the decree, Defendant was operating the business subsequently known as Fleetway, Inc. and Gill's Tire Market.

Extended hearings into the property rights of the parties commenced on the 22nd of December and were completed on the 28th of December. Findings of Fact and Conclusions of Law were then prepared and, it is Defendant's belief, covered all issues raised at the time of trial.

Extended hearings into the property rights of the parties commenced on the 22nd of December and were completed on the 28th of December. Findings of Fact and Conclusions of Law were then prepared and, it is Defendant's belief, covered all issues raised at the time of trial.

The Plaintiff explored, through her own witnesses and through cross-examination, the many claims which she had that the Defendant had wrongfully dissipated assets of the marital estate and had violated the Restraining Order issued.

The court found that Defendant had operated the businesses of Gill's Tire Market, Fleetway, Inc., and Tire City, that the businesses had not prospered, and that there had been no increase in assets of the parties used by Defendant to operate the businesses or to maintain himself (Finding #11, R. 160).

The court specifically found (#3, R. 158) that the Defendant had not intentionally secreted or hid assets belonging to the marital estate or attempted to deprive Plaintiff of her interest in those assets.

Plaintiff, through much of the hearing as shown by the transcript of testimony, tried to prove the contrary to Finding #3.

There was no finding that the Defendant had violated the Restraining Order which was in place during the period from October, 1979 to December, 1982.

ARGUMENT

POINT I

THE DISTRIBUTION ORDERED BY THE COURT IS  
A PROPER EXERCISE OF JUDICIAL DISCRETION.

POINT II

THE COURT DID NOT FIND THAT DEFENDANT  
VIOLATED THE RESTRAINING ORDER.

POINT III

AWARD OF ATTORNEY'S FEES WERE PROPER  
EXERCISE OF JUDICIAL DISCRETION.

POINT I

THE DISTRIBUTION ORDERED BY THE COURT IS  
A PROPER EXERCISE OF JUDICIAL DISCRETION.

The marital estate of parties to this action consisted of interest of the parties in going businesses which the Defendant continued to operate after the divorce complaint was filed, a home in which the Plaintiff resided, and numerous other miscellaneous items of personal property. Many hours of testimony were taken by the court and no restriction placed on any party to present every item of evidence available on the issues.

The record is clear that after January, 1980, when Plaintiff obtained her divorce, constant efforts were made to monitor and oversee the activities of the Defendant in the operations of the businesses he was engaged in.

The court decree divided the personal property by allocating to the Plaintiff and Defendant items that their interests seemed to indicate would be proper for them in building a new life. It orders

that the home of the parties be sold, the obligations relating to it paid and the balance of the proceeds divided one half to each of the parties. There was an order that accounts receivable from the Fleetway tire business be divided equally. Defendant was ordered to pay the business debts and the marital debts incurred by the parties prior to separation that any proceeds out of the bankruptcy be divided equally and that the Defendant pay all the business debts incurred in his business operation of Tire City. Defendant was ordered to pay any income tax obligations owing for the years 1977, 1978 and 1979 while parties lived together.

It is apparent Defendant believes that the court attempted to equitably divide the property acquired by the parties during their marriage and to make a 50-50 distribution. Considering the complexity of the business operations and the items of personal and real property, as well as extensive amount of obligations that were owing, Defendant submits that the court did a masterful and expert job in fashioning an equitable decree. The decree certainly cannot be shown to involve any abuse of discretion.

This court for many years has steadfastly adhered to the rule that the trial court is permitted considerable discretion in adjusting the financial and property interest of the parties and its actions are entitled to presumption of validity. Savage v. Savage, 658 P.2d 1201 (Utah 1983).

In another recent decision by this court, the rule was even more strongly stated and this court held in Gibbon v. Gibbon, 656 P.2d 407 as follows:



"In order to reverse the trial court's distribution of property in a divorce action, we must find that it "works such a manifest injustice or inequity, as to indicate a clear abuse of discretion." Turner v. Turner, Utah, 649 P.2d 6 (1982). In light of the widely divergent theories and conflicting testimony at trial, we cannot say that it was an abuse of discretion for the court to resolve the differences between the parties as it did."

See also, Woodard v. Woodard 656 P.2d 431.

Defendant submits that the division of the property rights of the parties demonstrates a careful exercise of discretion on the part of the trial court. It fashioned a decree equitable and fair. Allocating to each party the property that would promote the likelihood that the individual could resume his or her life and adjust to the status created by the divorce decree.

#### POINT II

#### THE COURT DID NOT FIND THAT DEFENDANT VIOLATED THE RESTRAINING ORDER.

The Restraining Order stipulated to by parties was entered on the 29th of October, 1979. Defendant obtained the divorce decree dissolving the marital relation on the 22nd day of January, 1980. During that period of time, the Fleetway business was being dissolved the Gill Tire Market business was not active and was heading for bankruptcy. There is no question but what all parties understood the circumstances and that Defendant was attempting to salvage what he could from the businesses that were rapidly deteriorating into insolvency.

It apparently is the position of Plaintiff that the Restraining Order was intended to prevent Defendant from continuing the operation of the businesses that he was engaged in or attempting to salvage and re-establish those businesses so that he could earn

money from his occupation.

The discovery proceedings and deposition of Defendant reveals knowledge of all parties that Defendant was continuing his business activities. Defendant submits that neither party interpreted the Restraining Order as meaning that the Defendant could not continue to operate to the best of his ability the businesses that he was engaged in at the time of the separation and the filing of the complaint.

Marital assets were sold or divided equally. Proceeds from horse sales were distributed by Defendant to Plaintiff demonstrating his interpretation of the Restraining Order. Plaintiff did not seek any contempt citations prior to the trial for Defendant's continued efforts to operate his businesses. It would appear that the Plaintiff also understood that the Restraining Order was not intended to prevent Defendant attempting to earn his living through Gill's Tire Market, Fleetway Tire or even in the establishment of Tire City.

Trial court did not find that the Defendant violated the Restraining Order.

The contention by Plaintiff that Defendant had intentionally secreted or hid assets belonging to the marital estate or attempted to deprive Plaintiff of her interest in those assets was a main issue at the trial. Most of the discovery proceedings were aimed at that particular contention. Plaintiff failed in her effort to

prove this allegation on which she had the burden of proof. The court found that Defendant did not intentionally secret or hide assets belonging to the marital estate or attempt to deprive Plaintiff of her interest in those assets. (R 157)

It is understandable that the Plaintiff was disappointed in Defendant's efforts to establish his retail tire business after the failure of Gill's Tire Market and Fleetway, Inc. It is also obvious that the Defendant was disappointed in these efforts and that his disappointment was probably greater than Plaintiff's. But that is a far cry from the proposition argued before this court in the brief of the Plaintiff that the business failures were the result of Defendant's intentional efforts. It is respectfully submitted, none of the parties intended the order would stop the operation by Defendant of any of the businesses or retail tire activities in which he was engaged.

POINT III

AWARD OF ATTORNEY'S FEES WERE PROPER  
EXERCISE OF JUDICIAL DISCRETION.

The court awarded Plaintiff attorney's fees of the approximate amount that were incurred by Plaintiff prior to the divorce on the 22nd of January, 1980 and did not award attorney's fees for the efforts following the divorce to show intentional dissipation of marital assets.

The barrage of discovery activity would seem to indicate a paranoia on the part of Plaintiff and her counsel. The final resolution of the matter demonstrates that the suspicions and fears of the Plaintiff which resulted in the repeated discovery maneuvers, were unfounded.

It is Defendant's position in this matter that the present appeal is an extension of the attitude shown in the trial and the solidly held belief by Plaintiff that Defendant's business reverses were not the result of his inability to establish a tire business such as he had conducted during the years of marriage and out of which he had supported himself and his family, but that his failures were due in some way to an intentional effort on his part to dissipate the marital assets and deprive Plaintiff of her share thereof.

A clear statement of this court's rulings on attorney's fees is found in Sears v. Riemersma, 655 P.2d 1105. The language of the court is as follows:

"The award of attorney's fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of that discretion. See Beckstrom v. Beckstrom, Utah, 578 P.2d 520 (1978); Turtle Management v. Haggis Management, Utah 645 P.2d 667 (1982). We find no clear abuse of discretion and affirm the award of attorney's fees."

It is true that the court did not award the Plaintiff the attorney's fees that the testimony of her attorney might have been earned. The court had before it a similar situation in Savage v. Savage, 658 P.2d 1201, and the language of the decision there seems especially appropriate here. It is as follows:

"Finally, on the question of attorney's fees, we hold that there was ample evidence to support the trial court's award and that there has been no showing of manifest injustice therein. The fee awarded was considerably less than that established by testimony at trial, and the evidence on the parties' relative ability to pay the amounts in question support the award. Absent an abuse of discretion, we will not second-guess the trial court on this issue where there is sufficient evidence on the reasonableness of the fee, the need of the plaintiff and the relative superiority of the defendant's ability to pay."

In Beckstrom v. Beckstrom 578 P.2d 520, the court had before it a refusal by the trial to give the attorney's fees requested and pertinent to the present question, Defendant believes is the court's language:

"The Laubs further complain of being short-changed by the trial court awarding it attorney's fees of only \$500 as the "reasonable" fee provided for enforcement of the contract. Their attorney testified that on the basis of the work involved the reasonable amount to award as his attorney's fee would be \$800. Even though that evidence is undisputed, the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award;<sup>7</sup> and in the absence of patent error or clear abuse of discretion, this court will not disturb his findings and judgment.<sup>8</sup>

7. Arnold Machinery Company, Inc. v. Intrusion Prepaht Inc., 11 Utah 2d 246, 357 P.2d 496.

8. 20 Am.Jur.2d Costs, Sec. 78.

The great majority of the hours claimed by Plaintiff were spent in trying to show intentional misuse of the marital assets. In this Plaintiff failed. For this time Defendant submits he should not be required to pay. This time was after the marital status had been dissolved and no one benefited from the hours thus spent.

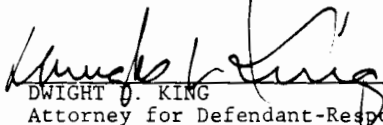
#### CONCLUSION

The record shows clearly that there was no abuse of discretion by the trial court in either the property settlement or attorney's

fee awards. No findings of a violation or the Restraining Order by Defendant was made. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of October, 1983.

DWIGHT L. KING & ASSOCIATES, P.C.

  
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